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Secretary
Federal Trade Commission
Rm H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Funeral Industry Practices
Trade Regulation Rule

Dear Mr. Secretary:

I am writing to offer comments of the funeral rule.

By way of background, I was one of the originators of the FTC's investigation into funeral industry practices back in 1972, as an FTC staff attorney. I was the managing attorney in charge of the FTC funeral investigation and funeral rule T.R.R. until I left the FTC in 1978 for private practice. I have not worked for the FTC for 20 years.

I will address various issues.

1. The Continuing Need for a Funeral T.R.R.

There is a continuing need for a funeral rule today, just as there was 20 years ago. The consumer who must make funeral purchase decisions is in a highly disadvantageous position. Grief, shock, guilt and the time pressures all serve to impair ordinary commercial judgment and to reduce the ability to make reasoned price/value comparisons. As a practical matter, there is a limited number of providers to choose from. There is also general ignorance about the prices of goods and services, legal requirements, and often even about religious customs.

The price disclosure requirements of the rule merely provide a baseline level of relevant price information. They do not solve or provide protection against all problems or abuses.

Additionally, over the last 20 years several large corporations have acquired large numbers of funeral homes and cemeteries which are generally operated under their long-standing local firm names. Consumers typically are not even aware that they are dealing with a conglomerate. In that regard, the Commission should consider requiring chain owned funeral homes to disclose their conglomerate affiliations.

I believe that studies would confirm that the funeral home charges for services, facilities and merchandise in conglomerate-owned funeral homes are above the average charges in non-conglomerate funeral homes. Similarly, in conglomerate-owned cemeteries, I believe the charges for plots and for opening and closing services are higher.

Funeral prices tend not to be subject to the discipline or downward pressure of the market dynamic because funeral homes and cemeteries do not tend to compete with one another on prices but only on non-economic issues--location, affiliations, appearance, etc.

The federal government does not determine the prices charged or issue licenses. It can and should perform at least the minimal function of assuring the availability of price information, proscribing some common abuses and encouraging insofar as possible that information, choice and competition be as available and free of artificial impediments.

2. Definitions of Funeral Provider

I do not believe that tinkering with the definition of who is a funeral provider is likely to be very beneficial or helpful. There is probably a genuine need for price disclosures and other substantive protections with regard to cemeteries, however, cemeteries are different from funeral homes and they present different issues and problems. If anything, there should be a separate cemetery rule, but exploration of that issue should not interfere with or delay any tightening of the funeral rule which has already been on the books for some 15 years.

3. Casket Handling Fees

One of the major objectives of the funeral rule originally was to free consumers from having to pay charges for goods or services which they did not need or want by having them bundled together. The separate casket price list and itemization requirements of the rule were a step in the right direction.

When charges for caskets were separately broken out, consumers and potential competitors could see that caskets could be bought and sold for lower prices while still yielding a profit.

Casket retailers started springing up, which represented a competitive threat to funeral homes. Consequently, some funeral homes have sought to discourage consumers from buying caskets from casket retailers. The simplest and most obvious way of discouraging consumers from patronizing casket retailer competitors is for funeral homes to impose a casket handling fee on caskets purchased elsewhere.

The FTC wisely sought to address that problem by the amendment prohibiting such casket handling fees which was first proposed in 1987 and was made effective seven years later on July 19, 1994. The fact that it took seven years to enact that simple and plainly justified protection is hard to understand, but the amendment was needed and it was sound. Additional protection is needed now.

Since the 1994 amendment, funeral homes all across the country have sought to circumvent the prohibition of casket handling fees by variations on two basic methods.

The first is to impose a surcharge where a casket is not purchased from the funeral home by charging a higher service fee (sometimes several hundred dollars higher). Sometimes, the higher service fee is justified as a means of recouping revenue lost from not making the casket sale. That is not a valid justification. A funeral home is free to set the prices for its services and

merchandise at whatever levels it chooses. Once set, however, the charges should be the same to whoever purchases those particular services or merchandise. A funeral home should not be able to charge higher service charges to an affluent customer who chooses to buy a less expensive casket from that funeral home to "recoup lost revenues." There is no greater justification for a surcharge imposed where a casket is purchased elsewhere.

The second method is really just like the first except that it is expressed in the opposite way. The funeral home "discounts" or reduces its service fee if the consumer buys a casket from the funeral home instead of from an outside vendor.

The effect is the same. The practice is just as pernicious and similarly unjustified.

Unfortunately, the United States Court of Appeals for the Third Circuit failed to recognize that a price differential to discourage purchase of a casket from an outside vendor is pernicious whether expressed as a surcharge or as a discount in its decision in Penn. Funeral Directors Assn. vs. FTC, 41 F.3d 81 (3rd Cir. 1994), the case which upheld the 1994 amendment.

The National funeral Directors Assn. seized upon the Third Circuits' dictum as a recognition that discounting to discourage purchases from casket retailers is "a legitimate method to compete against third-party casket retailers" in a document entitled "Guidelines For Handling Third Party Caskets" which it has distributed to funeral homes.

Any form of surcharge or discount by a funeral home which is linked to whether the consumer purchases a casket from the funeral home as opposed to a casket retailer is plainly an effort to discourage competition and to nullify any price advantages offered by non-funeral home casket vendors which should not be permitted. That practice is largely the same as the prohibited casket handling fees and should be prohibited for the same reasons as casket handling fees are prohibited.

I would suggest that the commission prohibit funeral homes from in any form charging customers who purchase caskets from a non-funeral home vendor higher prices for services or other merchandise than the prices paid by customers who do buy a casket from the funeral home. The prohibition should include charging higher service fees for consumers who buy caskets elsewhere as well as any form of reduction or discount offered to customers who do buy a casket from the funeral home.

Any form of funeral home price differential which is linked to whether the consumer buys a casket from the funeral home versus an outside vendor is deceptive and anti-competitive. the practice threatens the existence of casket retailers which represent a competitive alternative and stimulus to price competition which is badly needed in the funeral market place.

4. Non-Declinable Fees Currently Allowed Under §453.2(b)(4) (iii) C(1) or (2)

As noted above, one of the key objectives of the funeral rule was to unbundle funeral home charges to protect against consumers having to pay for services or facilities they did not want or use.

The rule requirement for an itemization of charges was the primary means of achieving that objective. The drafters of the funeral rule, including myself, recognized that there were inherent dangers in itemization and in the determination of the categories into which charges would have to be itemized. Fewer itemization categories poses the risk that consumers will still be paying for services they do not want or need which are bundled into a small number of itemization categories. More itemization categories poses the danger that consumers will end up paying higher charges and double charges by "overlaps" among itemization categories which are really charges for the same services called by different names.

I believe that allowing only one non-declinable service charge is highly desirable and thus support retention of §453.2(b)(4) (iii)(c)(1). I also believe that the Commission erred by allowing the § iii (c)(2) option. That option allows funeral homes to bundle their service charges into their casket charges. That practice was a primary target of the itemization requirement in the rule and it should not be permitted. That is especially true now that there are casket retailers competing with funeral homes on the prices charged for caskets.

Since a consumer who wants a funeral service must obtain that from a funeral home, funeral homes have a monopoly or oligopoly like position with regard to their services. Tying those services to caskets, which can be purchased elsewhere, is highly undesirable and should not be permitted.

I recommend that the Commission retain only § iii(c)(1) and delete the C(2) option.

5. Revision of the General Price List

I believe that some tightening and clarification of the General Price List Categories is in order. §453.2(b)(4) (ii)(A) calls for the price for forwarding of remains. That charge should only be imposed where a body is forwarded to another funeral home. In that event, there should be no separate (E) charge for transfer of remains to funeral home since that service should invariably be included where the body is to be forwarded to another funeral home.

I also believe that category F--Embalming--should be combined with category G--other preparation of the body--because having the two categories facilitates double-charging. While it is true that funeral directors do other things to prepare a body besides embalming such as washing the body, composing the features, combing the hair, etc., those services are customarily provided as an adjunct to embalming. If embalming is desired, as will usually be the case, the instances would be rare where the funeral director should need to genuinely impose a separate charge for other preparation of the body.

Conversely, if embalming is not going to be performed, the funeral home should not really have to impose a separate charge for other preparation of the body to cover any limited services that would be provided. The basic service charge and other charges will provide ample compensation to the funeral director.

6. Other Comments

A. Cost of Rule Compliance

Every retail business has to provide retail price information in some form or another and the cost of doing so is an inherent cost of doing business. The price lists required by the Rule are a minimal imposition both in terms of time and money required for compliance. With the prevalence of computers and low cost copy businesses producing and reproducing the required price list is neither expensive nor burdensome. Any complaints from funeral directors that they must bear high compliance costs because of the FTC funeral rule should have low credibility and be viewed with great skepticism.

B. The NFDA's Involvement and The Funeral Rule Offenders Program

The FTC rejoiced when the NFDA altered its long-standing stance of intransigent opposition to one of cooperation or perhaps co-optation, through the Funeral Rule Offenders Program. Certain facets of the program make sense. Many funeral homes are unsophisticated

and small. Inflexible imposition of draconian civil penalties for unintentional rule violations would be regulatory overkill and not a sound government policy.

The Commission must remember, however, that assuring the provision of simple retail price information is a very basic baseline objective, not a total cure of all funeral industry problems.

The Commission appears to be unaware of the dangers and risks associated with having the NFDA insinuated between funeral homes and the FTC through the Funeral Rule Offenders Program (FROP) and the Funeral Industry Rule Compliance Assurance Program (FIRCAP).

The FTC has given its blessing to the NFDA collecting great volumes of information from large numbers of funeral homes as to the prices they charge, their methods of itemization and the options they offer to consumers. Apparently, the FTC assumes that the NFDA is using that information only for good purposes, not for bad ones. I seriously question whether that assumption is warranted or accurate.

As suggested above, I have seen a handout prepared by the NFDA regarding casket handling fees which counsels funeral homes as to how they can offer "discounts" to consumers who buy their caskets from a funeral home as "a legitimate method to compete against third-party casket retailers."

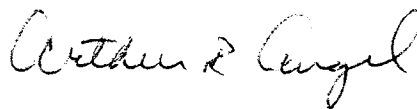
This illustrates one of the dangers associated with the NFDA's involvement--their ability to facilitate circumvention's of the objectives of the FTC rule. Another danger is that the collected price information can be used for price-fixing, "conscious parallelism," or selling what the market will bear. The effect of such actions will be higher prices paid by consumers facilitated by the FTC's working relationship with the NFDA.

The FTC's long history with trade associations of many different kinds should have taught it of the dangers trade associations represent. The FTC's desire to minimize its own compliance/enforcement costs should not blind it to, or cause it to disregard the dangers posed by the NFDA's involvement.

The FTC should be guided by the Latin saying--"Timce Danaos et done ferentes." (I fear the Greeks, though they bring gifts--a reference to the Trojan horse).

I hope these comments are helpful to the deliberations regarding the funeral rule.

Sincerely,

A handwritten signature in cursive script that reads "Arthur R. Angel".

Arthur R. Angel

ARA/slb